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No. 83-2097

In The
Supreme Court of the United States
October Term, 1984

BURGER KING CORPORATION
A Florida Corporation

Appellant,

vs.

JOHN RUDZEWICZ

Appellee.

ON APPEAL FROM
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

APPELLEE'S BRIEF

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QUESTIONS PRESENTED FOR REVIEW

Did Circuit Court Declare Florida Statute Unconstitutional?

Did the Circuit Court declare—as unconstitutional—the Florida long-arm statute [specifically, Sec. 48.193 (1)(g) which confers *in personam* jurisdiction upon one who breaches a contract by failing to perform required acts in Florida]?

Appellant argues, "Yes."

Appellee argues, "No."

Does Failure to Mail Checks Establish "Minimum Contact?"

Did Rudzewicz's failure to mail checks to Florida establish the constitutionally-required "minimum contacts" to confer *in personam* jurisdiction?

Appellant argues, "Yes."

Appellee argues, "No."

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1. OPINIONS AND JUDGMENTS BELOW

The Circuit Court's opinion below is reported as *Burger King Corporation v. MacShara,* 724 F.2d 1505 (11th Cir. 1984). It appears in the Joint Appendix (J.A.), at 166.

The District Court's "Findings of Fact and Conclusions of Law and Order Thereon" appear at J.A. 152; the "Final Judgment" is found at J.A. 164. Neither are reported.

2. JURISDICTIONAL GROUNDS

This Court has questioned whether it has jurisdiction over this appeal, reserving a final determination until completion of briefing and oral arguments.

Under its Rules, an appeal is available only if the Circuit Court held—as unconstitutional—Sec. 48.193(1)(g) of the Florida long-arm statute.[1]

The Florida long-arm statute was never found to be "repugnant to the Constitution"; rather, the Circuit Court held that, even though Rudzewicz's activities may have met the literal interpretation of the Florida long-arm statute, application of that statute to Rudzewicz, in these circumstances, violated his federal constitutional rights to "due process" and "fundamental fairness."

Furthermore, The Florida Supreme Court has never addressed, nor ruled on, the validity or constitutionality of Sec. 48.193(1)(g) of the Florida jurisdictional statute.

This appeal should be dismissed if this Court finds that the constitutionality of the Florida long-arm statute

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1 Rules of the Supreme Court, 16.1(a).

per se was not at issue, below. Furthermore, the alternative petition for *certiorari* should be denied because Rudzewicz did not have the required "minimum contacts" in Florida and because no federal or constitutional question has been raised in any of the courts below.

3. CONSTITUTIONAL PROVISIONS AND STATUTES

3.1. U.S. Constitution, Fourteenth Amendment

No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

3.2. Florida Long Arm Statute, Sec. 48.193

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person . . . to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:

• • •

(g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this State.

3.3. Michigan Franchise Investment Act

3.3.1. Franchise agreements within the act; offers; sales

(1) This act applies to all oral or written arrangements between a franchisor and franchisee in connection with the offer or sale of a franchise, including, though not limited to, the franchise offering, the franchise agreement, sales of goods or services, leases and mortgages of real or personal property, promises to pay, security interests, pledges, insurance, advertising, construction or installation contracts, servicing contracts, and

all other arrangements in which the franchisor or subfranchisor has an interest.

(2) An offer or sale of a franchise is made in this state when an offer to sell is made in this state, or an offer to buy is accepted in this state, or, if the franchisee is domiciled in this state, the franchised business is or will be operated in this state.

(3) An offer to sell is made in this state when the offer either originates from this state or is directed by the offeror to this state and received at the place to which it is directed. An offer to sell is accepted in this state when acceptance is communicated to the offeror in this state. An acceptance is communicated to the offeror in this state when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed. • • • MCL 445.1504

3.3.2. Franchise sales, prerequisites

A franchise which is subject to registration under this act shall not be sold without first providing to the prospective franchisee, at least 1 week prior to the execution by the prospective franchisee of any binding franchise or other agreement or at least 1 week prior to the receipt of any consideration, whichever occurs first, a copy of the prospectus, together with a copy of all proposed agreements relating to the sale of the franchise. MCL 445.1516

3.3.3. Damages; recision

A person who offers or sells a franchise in violation of sections 5(1), 6, or 16 is liable to the person purchasing the franchise for damages or recision, with interest at 6% per year from the date of purchase and reasonable attorney fees and court costs. • • • MCL 445.1531

D. COUNTER STATEMENT OF THE CASE

4.1. Summary

4.1.1. Statute Not Declared Unconstitutional

An appeal cannot lie here because the Circuit Court never declared the Florida long-arm statute to be unconstitutional. The Circuit Court took some care to recite the issue at bar:

> This case presents the question whether a Florida court can exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Miami.[2]

In its holding, the Circuit Court did not effect the constitutionality of the Florida long-arm statute:

> In sum, we hold that the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida. Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process. We therefore reverse the judgment.[3]

In dismissing the Complaint for lack of personal jurisdiction, the Circuit Court held that:

(a) While Florida's long-arm statute may appear to confer jurisdiction over the person of Rudzewicz . . .

(b) Nonetheless, the exercise of personal jurisdiction over Rudzewicz did not comport with basic "due process" requirements of the United States Constitution.

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2 J.A. 172.

3 J.A. 182-183.

4.1.2. No "Minimum Contacts"

Burger King's Lease/Sublease Agreement (J.A. 76) imposed an obligation on Rudzewicz to mail payments to Miami, Florida. The Circuit Court found that:

> With the exception of a Burger King University management course which MacShara [not Rudzewicz] attended in Florida and the Miami payment obligation, the contracts provided for no contact of any kind between the Florida headquarters and the franchisees.[4]

The Florida long-arm statute allows for *in personam* jurisdiction where a non-resident, contracting party fails to do an act—required by the contract to be done—in Florida.[5] Additionally, of course, a non-resident defendant must have the constitutionally-requisite "minimum contacts" with the forum state to allow such *in personam* jurisdiction.[6]

Burger King argues that Rudzewicz's non-mailing of rent to Florida was a failure to do an act—required by the Lease/Sublease Agreement to be done—in Florida. Please recall that the Lease/Sublease Agreement (and not the Franchise Agreement) required that rent be mailed to a U.S. Post Office box, at a general mail facility, in Miami, Florida (J.A. 113, Paragraph 14.2; Tr 85).

There is no evidence that Rudzewicz ever mailed even one rent check to Florida.

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4 J.A. 171.

5 Section 48.193(1) (g), Fla. Stat. (1983).

6 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

4.13. No Jurisdiction by "Implied Consent"

On this appeal, Burger King introduces a new argument that was not advanced in its Jurisdictional Statement. Burger King now argues that *in personam* jurisdiction over Rudzewicz was achieved by his "implied consent." Quoting Appellant's brief:

> [T]he argument advanced [by Burger King] would sanction a general rule, or at least a presumption, that participation in an interstate franchise relationship, which is centralized rather than decentralized, should represent a form of consent to the jurisdiction of the franchisor's place of business. . . .[7]

To the contrary, Rudzewicz did not actively pursue commercial transactions throughout the various States but, rather, only in Drayton Plains, Michigan. Rudzewicz knowingly reached out from his domicile in Michigan (not to other states but, rather) to Burger King's Michigan regional headquarters. Rudzewicz effected nothing in Florida and received no economic advantages in Florida.

Rudzewicz did not intentionally become a part of an interstate economic network for pecuniary gain: he shipped none of his hamburgers across state lines; rather, he merely sold Whoppers and fries to passers-by in Drayton Plains, Michigan. The Circuit Court noted that "the contracts contemplated the startup of a local Michigan restaurant whose profits would derive solely from food sales made to customers in Drayton Plains" (J.A. 179).

4.2. Uncontroverted Facts

Only four witnesses testified at trial: Burger King's Tom Vrabel (Tr 82-166) and Helen Donaldson (Tr 166-

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7 Appellant's Brief, p. 46.

250), plus franchisees Brian MacShara (Tr 470-597) and John Rudzewicz (Tr 39-82, 262-469). Burger King introduced no evidence to rebut the testimony of Rudzewicz and MacShara.

Therefore, the facts presented below are uncontroverted by any other evidence in the record.

4.3. Background

Brian MacShara's formal education included 18 months of college and his employment background included a brief stint as a hamburger-flipper at a Burger King restaurant (Tr 471); however, most of his experience had been in construction work with his father's firm (Tr 472).

John Rudzewicz is a certified public accountant with his own firm, Follmer, Rudzewicz & Co., P.C., located not far from Drayton Plains, Michigan. Personally, he never did any accountancy affecting any Burger King restaurant; however, in the past, some public accountants in his firm had done some work for a Burger King franchisee (Tr 425).

Rudzewicz wanted to invest in a Burger King restaurant that MacShara would operate. Burger King understood that Rudzewicz was the financial partner (Ex 1; Tr 39), while MacShara was to be the day-to-day operating partner (Exs 1, 11). Burger King sold Rudzewicz and MacShara a $45,000 franchise in Drayton Plans, Michigan (J.A. 41) and gave them a $1.2 million lease (J.A. 76), both for 20 years.

4.4. Franchisees and Franchise in Michigan

Both franchisees are domiciled in Michigan (J.A. 152, 153; Tr 39-40, 365, 391). Moreover, the franchised business (Store 775) was located in Michigan (J.A. 153; Tr 85, 392).

Under the Michigan Franchise Investment Act, either condition alone would invoke Michigan's comprehensive statutory and administrative scheme to regulate franchises.[8]

4.5. Burger King's Michigan Headquarters

Virtually every contact between Rudzewicz and Burger King was in Michigan.

Burger King maintains a sizeable and well-established regional headquarters office in Birmingham, Michigan—within minutes of Rudzewicz's office. This Michigan regional headquarters supervised Store 775 (Exs P, T).

Burger King does " . . . acknowledge that the franchisees had direct contact with the [Michigan] district office. . . ."[9] The Circuit Court's opinion elaborates that "during the course of negotiations, which lasted five months, the Michigan district office was Burger King's sole representative in dealing with Rudzewicz and MacShara" (J.A. 169). Furthermore, the Circuit Court said:

> Nothing in the course of the negotiations gave Rudzewicz reason to anticipate a Burger King suit outside of Michigan. The only face-to-face or even oral contract Rudzewicz had with Burger King throughout months of protracted negotiations was with representatives of the Michigan office.
>
> Burger King had the Michigan office interview Rudzewicz and MacShara, appraise their application, and discuss price terms, recommend the site which the defendants finally agreed to, and attend the final closing ceremony.
>
> There is no evidence that Rudzewicz ever negotiated with anyone in Miami or even sent mail there during negotiations. He maintained no staff in the state of Florida, and as far as the record reveals, he had never even visited the state.[10]

Rudzewicz's first discussions with Burger King about owning a franchise occurred in Michigan in 1977 (Tr 473); all subsequent meetings and consultations affecting this transaction likewise occurred in Michigan (Tr 506).

Burger King interviewed prospective franchisee Rudzewicz at its Michigan regional office. Burger King mailed Rudzewicz its letter, accepting him as a "franchisee," from its Michigan regional headquarters (Ex 2).

At the conclusion of each step in this process, Burger King sent documents to Rudzewicz (still in Michigan) (*e.g.,* Prospectus, Preliminary Agreement, Franchise Agreement, Lease/Sublease Agreement, and assorted correspondence) (J.A. 169).

The Prospectus, affecting this franchise offering, was registered with the State of Michigan's Department of Commerce, Office of Franchise and Agent Licensing (J.A. 119). This Prospectus was mailed to franchisees in Michigan (J.A. 5).

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8 MCL 445.1504(2).

9 Appellant's Brief, p. 13 n. 11.

10 J.A. 178-179.

The Circuit Court's opinion states that it was Burger King's Michigan district manager who

> . . . persuaded [the franchisees] to acquire an existing store in Drayton Plains, Michigan to avoid the higher rent that would be entailed if they insisted upon construction of a new building. He also convinced them to purchase and install $165,000 worth of equipment before the final rental charge had been computed.[11]

The $165,000 of equipment was purchased by a Michigan limited partnership called "RMBK-2" which had two partners—Rudzewicz and John Ureel (who was otherwise uninvolved in this franchise transaction). Co-franchisee MacShara was not involved in "RMBK-2."

The Circuit Court found that MacShara and Rudzewicz never formed a partnership (J.A. 182, n. 14). Rather, they incorporated under the name "RMBK Corp." (Tr 49) to operate Store 775 (Tr 282). These franchisees assigned the Franchise Agreement to "RMBK Corp." which operated Store 775.

Burger King admits that its " . . . Michigan office was involved in [an] extended period of negotiation . . . " with franchisees.[12] Neither before, during, nor after these negotiations did Rudzewicz ever go to Florida to execute any document whatsoever (Tr 201, 220), nor was any part of the franchised restaurant business ever conducted in Florida. The Circuit Court noted:

> Under the contract, the local Michigan district office was responsible for providing all of the

11 J.A. 169.

12 Appellant's Brief, 19.

> services due Rudzewicz, including advertising and management consultation. Supervision, moreover, emanated from the office alone. To Rudzewicz, the Michigan office was for all intents and purposes that embodiment of Burger King. He had reason to believe that his working relationship with Burger King began and ended in Michigan, not at the distant and anonymous Florida headquarters."[13]

4.6. Offer Made/Accepted in Michigan

The "offer" of this particular franchise to Rudzewicz came in the form of the Preliminary Agreement (J.A. 37), which was sent by Burger King to Michigan (Ex 3, 4). Twice, Burger King wrote to Rudzewicz in Michigan, encouraging him to tender his "offer" by executing this Preliminary Agreement (Exs 5, 6).

Ultimately, Rudzewicz did make an "offer" to operate a Burger King franchise by signing this Preliminary Agreement; this, too, was done in Michigan. In turn, Burger King communicated its acceptance of that "offer" back to Rudzewicz (who, still, was in Michigan) (Ex 7).

Only four days before the "closing," Burger King tendered its complete version of the Franchise (J.A. 41) and Lease/Sublease (J.A. 76) Agreements to franchisees in Michigan (Tr 22-23, 202). The Circuit Court noted Burger King's take-it-or-leave-it attitude:

> . . . Burger King decided to schedule the grand opening for May 31, 1979, the close of its fiscal year, to ensure that the sale appeared in the company's year-end statement.
>
> On May 29, the day the final agreements arrived for signature, Rudzewicz and MacShara finally

13 J.A. 179.

learned what rent Burger King expected them to pay [*e.g.*, $4,166 to $5,286 per month]. The figure was far in excess of the amount Rudzewicz had projected [*e.g.*, $2,010 to $2,500 per month].

[Rudzewicz] telephoned [Burger King's Michigan Franchise District Manager] Hoffman and demanded a lower figure. According to Rudzewicz, Hoffman replied that the rent computation was out of his hands. If Rudzewicz was unwilling to accept the figure Burger King proposed, Hoffman continued, he was always free to decline the franchise, rip out the fixtures [valued at $165,000] he had installed at his own expense, and resell them at a loss.

On June 4 Rudzewicz and MacShara signed the lease and franchise agreements in their individual capacities at a Michigan closing ceremony attended by employees of the [Burger King] local district office.[14]

After executing these documents (Tr 365), Rudzewicz tendered these Agreements, on the spot, to Burger King's Michigan regional representative, along with his $45,000.00 certified check (Ex 10), drawn on a Michigan-based bank (*viz.*, Michigan National Bank).

Burger King returned the finally-executed versions of these two Agreements back to franchisees in Michigan (Ex K; Tr 314). This act alone invokes application of the Michigan Franchise Investment Act.[15]

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14 J.A. 169-170; Tr 201, 220.

15 MCL 445.1504(2) (3).

4.7. Continuous, Systematic Business in Michigan

Franchisee Rudzewicz purchased equipment and supplies from the Michigan office of Burger King's Distron and Davmor Divisions. In exchange, payment was mailed to Burger King's regional office in Michigan (Ex M-A; Tr 156).

When Rudzewicz's payments fell in arrears, Burger King mailed all notices of delinquency, default, and termination to Michigan.[16]

In sum, Rudzewicz maintained a continuous and systematic business in Michigan—not in Florida!

4.8. No Continuous, Systematic Business in Florida

Rudzewicz had no place of business in Florida, nor was he ever licensed or authorized in any jural form (neither as a corporation, partnership, nor under any assumed name) to do business in Florida.

Franchisee Rudzewicz had no agent for service of process in Florida. He never performed any act in Florida related to Burger King, never provided a related service in, or sold a related product that reached, Florida.

Rudzewicz never signed any agreement in Florida. He never had any employee based in, nor ever recruited any employee from, Florida. In addition, franchisees never owned any real property in Florida, never maintained any office or establishment there, and never maintained any business records in Florida.

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16 Exs A, B, E, F, G, J, V, M-F, M-I, 17, 18 and 19.

Rudzewicz never availed himself of any so-called "benefits" of Florida law. Florida law offered no benefits to Rudzewicz, only detriments. For example, Florida has no comprehensive, franchise regulatory scheme (as does Michigan): there is no Florida franchise investment act, no Florida "office of franchise licensing" overseeing franchisors, and no protective umbrella under which franchisees can seek shelter from any overreaching by Burger King.

The only "benefit" offered by Florida law to Rudzewicz was the albatross of traveling some 1,200 miles from Detroit to Miami to defend himself in a federal court, far removed from Burger King's Michigan regional headquarters where this entire franchise process was conceived and aborted.

Certainly, Florida law imposed no obligations on Burger King, while offering Burger King every benefit (*viz.*, litigating against their "disputatious franchisees" in Miami).

In fact, Michigan (not Florida) was the only state significantly affected by Rudzewicz's franchise activities. It was in Michigan where business taxes, property taxes, and payroll taxes were paid; where all employees were found and their wages paid; where Burger King headquartered its regional employees to supervise Store 775; and, where Burger King had registered its statutorily-required Prospectus (J.A. 5).

In sum, Rudzewicz maintained no continuous and systematic business in Florida but, rather, only in Michigan!

4.9. Michigan Franchise Investment Act Applies

The Circuit Court noted "the particular distribution of power in the franchise relationship" and commented that:

> In a franchise contract, "the franchisor normally occupies [the] dominant role. Annot., 67 A.L.R. 3d 1299, 1302 (1975). *See, e.g., Shell Oil Co. v. Marinello,* 63 N.J. 402, 307 A.2d 598, 67 A.L.R.3d 1291 (1973), *cert. denied,* 415 U.S. 920, 94 S.Ct. 1421, 39 L.Ed.2d 475 (1974). In recent years, certain states, including Michigan, have moved to enact statutes to police the more flagrant excesses of franchises. Annot., 67 A.L.R.3d at 1301.[17]

The Michigan Franchise Investment Act (called the "Franchise Act"), MCL 445.1501 *et seq.*, is more than a dozen pages of comprehensive, remedial legislation that is systematic in its regulation of the franchise process and its participants. That law governs this franchise transaction, these franchisees, and this franchised restaurant.

Under Michigan's Franchise Act, Burger King admitted it was required to (and did) register its Uniform Franchise Offering Circular (called "Prospectus" (J.A. 5)) with the State of Michigan's Department of Commerce, Office of Franchise and Agent Licensing (J.A. 119; Tr 203, 205), pursuant to MCL 445.1506.

Burger King did not voluntarily register its Prospectus. This particular franchise transaction was not exempt from registration. In fact, Michigan's Office of Franchise Licensing made a determination that Burger King was subject to the Franchise Act; it found that Burger King obtained no

> . . . exemption [from the Michigan Franchise Investment Act] for the sale of the Burger King franchise to be located at 4983 Dixie Highway, Drayton Plains, Michigan, Store No. 775, to Brian

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17 J.A. 181.

MacShara and John Rudzewicz on June 4, 1979. . . .[18]

4.10. Burger Kind Admits Michigan Act Governs

Contrary to the "governing law" provision of its Lease/Sublease Agreement, Burger King readily concedes (as cited below) that the true "governing law" here was the Michigan Franchise Investment Act—and not Florida contract law![19]

Burger King admits that in ". . . the State of Michigan, there is a required compliance with Michigan's investments franchise law" (Tr 13). Specifically, Burger King's corporate Secretary (and signator to all three agreements) admitted that ". . . Burger King in this particular transaction [is] subject to the Michigan franchise investment law . . ." (Tr 191).[20]

In fact, when Burger King conveyed its Prospectus to Rudzewicz, it admitted that it did so "pursuant to the requirements of Michigan's Franchise Investment Law . . ."

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18 J.A. 19.

19 In the dissenting opinion of the case below, and contrary to this Court's holding in *Kulko v. Superior Court of California*, 436 U.S. 84 (1978), Judge Johnson incorrectly urged that, because Rudzewicz had signed a contract which contained a Florida "governing law" provision, he had purposely availed himself of the benefits and protections of Florida law and, thus, could be sued in Florida. Burger King itself has repudiated the efficacy of this Florida "governing law" provision, as it applies to Rudzewicz; this Court held in *Kulko* that even though a state may be the " 'center of gravity' for choice-of-law purposes [it] does not mean that California has personal jurisdiction over the defendant."

20 MCL 445.1504(1).

(J.A. 5). And, on the very cover sheet of this Prospectus, Burger King declares that it is subject to the Michigan Franchise Investment Act (J.A. 8).

Finally, Burger King advised its own Michigan Franchise District Manager that Rudzewicz's "franchise approval in [Michigan] is in compliance with franchise legislation presently in effect" (Ex Z).

4.11. Burger King Violated Michigan Franchise Act

In its Prospectus, Burger King admitted that:

> The Michigan franchise investment law makes it unlawful to offer or sell any franchise in [Michigan]
>
> . . . without first providing to the prospective franchisee, at least 7 days prior to the execution by the prospective franchisee of any binding franchise or other agreement, or *at least 7 days prior to the payment of any consideration by the franchisee*, whichever occurs first, a copy of the offering circular together with a copy of all proposed agreements relating to the franchise [emphasis added].[21]

Burger King's corporate Secretary was a signatory to the Preliminary Agreement (J.A. 40), Franchise Agreement (J.A. 74), and Lease/Sublease Agreement (J.A. 116). She admits that Burger King was aware of this seven-day, statutory mandate (Tr 191).

Burger King's Michigan Franchise District Manager accepted Rudzewicz's $45,000 check on June 4th (Ex 10), when the binding agreements (J.A. 41, 76) had just been received on May 31st, *only four days before the June 4th closing*.

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21 J.A. 8-9; Tr 208; see also, MCL 445.1516.

Burger King admits that franchisees did not have the binding Franchise Agreement (J.A. 41) (which included the name and jural form of doing business of the franchisees), or the binding Lease/Sublease Agreement (J.A. 76) (which included the name, jural form of doing business of franchisees, plus the minimum monthly rent) for the statutorily-required seven days prior to their date of execution (Tr 193-194, 200).

Burger King's failure to comply with this statutory prerequisite constitutes a *per se* violation of Michigan's Franchise Investment Act.[22] As such, it automatically entitles franchisees to damages or recision of the Franchise and Lease/Sublease Agreements.[23]

4.12. Difficult to Defend in Florida

Burger King admitted, at trial, that it was burdensome for Rudzewicz to defend himself in Florida because many witnesses from its own Michigan regional headquarters, and others, would have to be brought to Miami at great expense to Rudzewicz (Tr 574-575).

Even the Circuit Court noted that:

> Just as Rudzewicz lacked notice of the possibility of suit in Florida, he was financially unprepared to meet its added costs. * * *
>
> There is no indication that Rudzewicz had any latitude to negotiate a reduced rent or franchise fee in exchange for the added risk of suit in Florida. * * * Burger King resisted price concessions, only to sue Rudzewicz far from home. In doing so, it severely impaired his ability to call Michigan witnesses who might be essential to his defense and counterclaim.[24]

22 MCL 445.1516.

23 MCL 445.1530.

Yet, after the trial and upon appeal, Burger King, almost facetiously, represents that:

> . . . Mr. Rudzewicz was no less inconvenienced by the necessity of litigating in Florida than would Burger King be inconvenienced by the necessity of litigating in Michigan—and prospectively, in all 50 states. At best, this consideration is a standoff.
>
> If the question were one of convenience, then Burger King could claim an equal or greater inconvenience of litigating in Michigan.[25]

4.13. "Choice of Law" Provision

Burger King also admits that "the choice of [Florida] law provision does not require that all suits concerning this [franchise] Agreement be filed in Florida" (J.A. 72).

Indeed, Burger King concedes that it is "doing business," "found," and "situated" in Michigan by acknowledging that:

> [d]uring all this time, of course, the franchisees could have brought an action against Burger King in Michigan—asserting all the claims which they eventually asserted in their Florida counterclaim.[26]

Thus, when Burger King is the plaintiff, you won't "have it your way" because it sues all franchisees in Miami, regardless of their domicile or where they are doing business. Many Burger King franchisees have chal-

24 J.A. 180, 181-182.

25 Jurisdictional Statement, 27; Appellant's Brief, 45.

26 J.A. 146; Appellant's Brief, p. 20, n. 19.

lenged personal jurisdiction in the Southern District of Florida, without success.[27]

5. SUMMARY OF ARGUMENT

5.1. No "Appeal of Right"

5.1.1. Long Arm Statute Uneffected

Burger King, a Florida corporation, appeals from the decision of the United States Court of Appeals, Eleventh Circuit.

Burger King misperceives that the Circuit Court held—as unconstitutional—the Florida long-arm statute. Not true! The Circuit Court made no ruling on that statute's constitutionality. Rather the Circuit Court held that:

> a Florida court can [not] exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Miami.[28]

5.1.2. No Appeal of Right

There is an appeal here only if the Circuit Court held the Florida long-arm statute unconstitutional. Certainly, there is a right of direct appeal by any party relying on a state statute held by a court of appeals to be invalid as

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27 See these U.S. District Court, Southern District of Florida cases: *Burger King Corp. v. Elliott*, 80-2694-Civ-EBD; *Burger King Corp. v. Wagner*, 80-942-Civ-EBD; *Burger King Corp. v. Snow*, 80-295-Civ-SMA; *Burger King Corp. v. Robinson*, 79-5824-Civ-EPS; *Burger King Corp. v. Mason*, 78-2932-Civ-EBD; *Burger King Corp. v. Levine*, 80-5852(08); *Burger King Corp. v. CPM&F, Inc.*, 537 F.Supp. 651 (S.D. Fla. 1982) where Burger King tried to sue a Hawaiian defendant in Florida.

28 J.A. 172.

repugnant to the Constitution.[29] However, since the constitutionality of the Florida long-arm statute was uneffected by the Circuit Court's decision, there can be no appeal.[30]

Finally, Burger King has conceded that "no court involved in the instant action has certified to the Florida Attorney General the fact that the constitutionality of a Florida Statute is drawn in question" (Jurisdictional Statement, at ii). Indeed, neither the U.S. District Court, nor the 11th Circuit Court of Appeals, certified the issue to the Florida Supreme Court; therefore, neither of these two courts must have thought the constitutionality of the statute was being called into question.

The Circuit Court's studied opinion was eloquent, but it contained no "holding" effecting the constitutionality of the Florida long-arm statute. More subtly, the Circuit Court only held ". . . that invocation of that [long-arm] statute *under these circumstances* exceeds the bounds of due process" (Jurisdictional Statement, at A7).

Burger King improperly invokes the jurisdiction of this Court in seeking an appeal.[31] In sooth, Burger King can only petition for *certiorari* (which should be denied), for it has no appeal.

5.1.3. Failure to Act is not "Minimum Contact"

Rudzewicz's failure to mail checks to Florida *per se* does not establish the constitutionally-required "minimum con-

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29 28 U.S.C. 1254(2).

30 Rules of the Supreme Court, 16.1(a).

31 28 U.S.C. 1254(2).

tacts" to confer *in personam* jurisdiction in Florida. Rather than it being a "contact," the failure to do an act is a "non-contact." Only a semantic gymnast could contort such a negative into a positive.

The Circuit Court's Opinion Below conflicts with no other federal court of appeals on the same matter. In fact, the 11th Circuit's Opinion Below agrees with rulings on the same matter from the 5th Circuit, 6th Circuit, 7th Circuit, and 8th Circuit (Jurisdictional Statement, p. 28, n. 48), in addition to agreeing with every opinion of this Court on the issue of "minimum contacts."

Moreover, the Opinion Below conflicts with no decision of the Florida Supreme Court on the same matter. While the Florida Supreme Court has never ruled on the same matter, the Opinion Below agrees with decisions of several Florida state appeal courts on the same matter.

Finally, the Circuit Court's Opinion Below follows the accepted and usual course of judicial proceedings and does not call for an exercise of this Court's power of supervision. Indeed, the Opinion Below is in tune with the long litany of personal jurisdiction cases handed down by this Court since 1945 (Jurisdictional Statement, p. 16, n. 20).

5.1.4. Burger King's Policy Objective

Given the chance, Burger King would sue the franchisees (of its 3,000 nationwide, identical restaurants) in the Miami federal court—regardless of whether the franchise is found in Hawaii, Alaska or, apparently even, Australia! Please appreciate that "Burger King does business in all 50 states, the Commonwealth of Puerto Rico, and 9 other nations" (J.A. 10-11).

Burger King confesses its true motive when it asks this High Court to do, by judicial fiat, what the Florida legislature has refused to do, namely fashion a new rule that says:

> . . . participation in an interstate franchise relationship, which is centralized rather than decentralized, [is] a form of consent to the jurisdiction of the franchisor's principal place of business. . . .[32]

With no hint of shame, Burger King candidly promotes the Orwellean "efficiency" to be realized when only the Miami federal courts—unfettered by that clutter of minor U.S. district courts elsewhere—would be permitted to pursue the unending search for "uniformity and predictability" in adjudicating Burger King's complaints with its "disputatious franchisees."

Unabashedly, Burger King seeks to achieve a broad policy objective in this appeal. Rather than rely on some "governmental system," Burger King itself, guided by Miami's federal court, would conduct a "legitimate regulatory program" over its globally-scattered franchisees. Contending that "the resolution of disputes in a single forum aids that goal" of "uniformity and predictability," Burger King's

> . . . interest is more than mere convenience; it extends to the broader regulatory objective of insuring uniformity and consistency throughout a nationwide system.[33]

Will this brand of thinking evolve into a federal "car court" for General Motors in Detroit? A "cola court" for

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32 Appellant's Brief, p. 46.

33 Appellant's Brief, p. 44.

Coke in Atlanta? And, a "hamburger court" for Burger King in Miami? So, when we view this case with some judicial and public policy perspective, we must admit—as does Burger King—that:

> [t]his case may determine whether [Burger King] must litigate not under a coherent set of [Florida] laws enforced in [Florida]—but wherever a disputatious franchisee may reside.[34]

Nonetheless, we believe this Court need not consider Burger King's centralized approach to litigation because, in no respect, did the 11th Circuit Court ever declare, as unconstitutional, Florida's long-arm statute.

5.2. No "Minimum Contacts"

A plethora of cases have held that the mere payment of rent (not to mention its non-payment) does not *per se* establish any "minimum contacts" in the forum state by a non-resident payor. There have been many cases, where the non-resident defendant had significantly more contacts than Rudzewicz did here, and the complaint still was dismissed for the lack of constitutionally-required "minimum contacts."[35]

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34 J.A. 15.

35 Burger King misrepresents to this Court that Rudzewicz's " . . . post-trial compromise of the trademark claims was a waiver of any challenge to the jurisdiction of the district court" (Appellant's Brief, pp. 23, 47). That misrepresentation is intellectually untenable. First, this question of waiver was never presented to the 11th Circuit as an issue to be decided, it was not raised in the Jurisdictional Statement filed with this Court, and it is now mentioned, for the first time, in Appellant's Brief; as such, this contravenes Supreme Court Rule 34(1) (a) and any discussion should be disregarded or striken by this Court.

(Continued on next page)

The Supreme Court need not scrutinize, again, the constitutional touchstone of "due process" and fundamental fairness. Rudzewicz should only be required to defend in Michigan, where he is domiciled, where this business transaction occurred, and where the franchised restaurant is located, and not in Florida where he conducted no continuous and systematic business and had not even the most fleeting, minimal contact.

6. ARGUMENT

61. No Appeal of Right

No Appeal of Right
Since Florida Statute
Never Declared Unconstitutional

> **The Circuit Court never declared—as unconstitutional—Sec. 48.193(1) (g) of the Florida Statutes (which confers long-arm jurisdiction upon one who breaches a contract in Florida by failing to perform acts, required by the contract, to be performed in Florida).**

This Court has questioned whether it has jurisdiction to hear this case as an appeal. Apparently, this jurisdictional concern arises over whether the 11th Circuit ever declared—as unconstitutional—Florida's long-arm statute.

In the mind's eye of Burger King, it sees some phantom declaration of unconstitutionality by the Circuit

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(Continued from previous page)

Second, Rudzewicz only waived his right to appeal the trial court's Finding of Fact, No. 35 (J.A. 159) and its Conclusion of Law, Paragraph M (J.A. 162); an agreement not to appeal a particular finding or conclusion is only that, nothing more, and does not waive any challenge to the fundamental, public policy question of jurisdiction argued here.

Court, despite no visible evidence to support this specter. Burger King should rest assured that its fears are nothing more than ghosts in the closet because Rudzewicz has never challenged the constitutionality of the Florida long-arm statute, nor has any court considered or ruled on its validity or otherwise found it to be "repugnant to the Constitution."

6.1.1. "Constitutionality" Never Challenged

Rudzewicz never challenged the long-arm statute's constitutionality in his original "minimum contacts" motion filed in District Court (J.A. 136); neither did the District Judge, specifically and unquestionably, discuss that statute *per se* when ruling on the motion (J.A. 138-139).

When Rudzewicz appealed to the Circuit Court, again, he never challenged the constitutionality of the long-arm statute. In fact, Rudzewicz raised only the "minimum contacts" question; in framing his issue, he asked the Circuit Court to determine:

> WHETHER the Florida U.S. District Court has no *in personam* jurisdiction over franchisee Rudzewicz because he had no "minimum contacts" in Florida?

Upon oral argument, no one on the Circuit Court panel questioned either counsel about the long-arm statute's constitutionality.

Burger King first insinuated that the 11th Circuit had injudiciously amputated a portion of Florida's long-arm statute when it filed "Appellee's Petition for Rehearing (by the Original Panel) and Suggestion of *En Banc* Consideration upon Rehearing." No jurist on the 11th Circuit even wanted to poll the other circuit judges on Burger King's Petition; thus, the Court ordered that:

> . . . no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled . . . the Suggestion for Rehearing En Banc is DENIED.

J.A. 186. One might ask, rhetorically: if even one judge in the 11th Circuit thought that the Panel had held the Florida long-arm statute to be "repugnant to the Constitution," wouldn't that judge, at least, have suggested a poll?

Plain and simple: the Opinion Below never declared the Florida long-arm statute unconstitutional.[36]

6.1.2. "Act of Congress" Not at Issue

Contrary to the clear dictates of this court and Congress, Burger King improperly relies on several rulings of this Court as supporting an appeal here regarding the constitutionality of a state's long-arm statute; however, Burger King's reliance is misplaced.

28 U.S.C. Section 1252 provides for appeal to this Court from decisions invalidating Acts of Congress. Contrary to Burger King's representations, no Act of Congress has been invalidated, nor has any Act of Congress ever been at issue in this matter such as to give this Court jurisdiction by appeal.

Burger King promotes its appeal arguing several cases which are not at all common or similar to those in

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36 An aside: in reading the decision in *Federal Reporter 2d*, the editor's headnotes never suggested that the state statute was held unconstitutional.

this particular case. Burger King proffers *Calder v. Jones*[37] in support of its appeal. However, in *Calder,* although this Court granted *certiorari,* it concluded that jurisdiction by appeal did not apply since the decision below did " . . . not purport to determine the constitutionality of the California jurisdictional statute."[38] The Court also dismissed the appeal of *Kulko,* which Burger King proffers as well, since the constitutionality of the state jurisdictional statute had not been raised in the lower court.[39]

6.1.3. Congressional Test for Appeal

Congress would allow an appeal here only if the Circuit Court diagnosed a constitutional infirmity in Florida's long-arm statute (which, in truth, was never detected). We must test Burger King's premise against congressional limitations.[40]

This Court's appellate powers have been clearly defined by no less a Constitutional authority than Chief Justice Marshall:

> The appellate powers of this court are not given by the Judicial Act. They are given by the Constitution. But they are limited and regulated by the Judicial Act. And by such other acts as have been passed on the subject.[41]

Furthermore, as reiterated by Chief Justice Fuller, almost 100 years ago:

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37 *Calder v. Jones,* — U.S. —, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984).

38 *Id.* at 1486 n.7.

39 *Kulko v. Superior Court of California,* 436 U.S. 84 (1978).

40 28 U.S.C. 1254(2).

41 *Durousseau v. U.S.,* 6 Cranch 307, 3 L.Ed. 232 (1810).

> From *Wiscart v. Dauchy,* 3 Dall. 321, to *American Const. Co. v. Jacksonville, T. & K.W.R. Co.,* 148 U.S. 372, 13 Sup. Ct. Rep. 758, it has been held in an uninterrupted series of decisions that this court exercises appellate jurisdiction only in accordance with the acts of congress upon that subject.[42]

These rulings control today, as they did when first announced. Pertinent here, Congress legislated that:

> Cases in the courts of appeals may be reviewed by the Supreme Court . . . by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution . . . and the review on appeal shall be restricted to the Federal questions presented.[43]

This Court has consistently restricted appeals regarding the constitutionality of state statutes to those particular cases where:

> . . . the record shows that the question of the validity under the federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state . . . or has in fact been decided by it . . . and that its decision was necessary to the judgment [citations omitted].[44]

In further analysis of the necessity for this doctrine, the Court has clearly provided:

> Apart from the reluctance with which every court should proceed to set aside legislation as non-constitutional on grounds not properly presented,

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42 *Colorado Cent. Consolidated Min. Co. v. Turck,* 150 U.S. 35, 36 (1983).

43 28 U.S.C. 1254(2).

44 *Wilson v. Cook,* 327 U.S. 474, 480 (1946).

> due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, refuses to consider any grounds of attack not raised or decided in that court.[45]

These findings and reasoning of the Court have been consistent in every opportunity in which it has been requested to rule on the constitutionality of a state statute.[46]

6.1.4. The Circuit Court's Holding

The Circuit Court did not find Florida's long-arm statute as "repugnant to the Constitution" but, rather, found that "[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process" (J.A. 183).

Burger King argues that the decision of the Circuit Court ". . . *necessarily* held the Florida statute unconstitutional" [emphasis in the original] (*Appellant's Brief*, p. 26). However, this Court has

> . . . consistently distinguished between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute.[47]

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45 *Id.* at 484.

46 *See Kulko v. Superior Court of California, supra,* where the Court dismissed the appeal because the jurisdictional statute had not been contended in state court as being unconstitutional; *United Gas Pipe Line Company v. Ideal Cement Company,* 360 U.S. 134 (1962).

47 *Silkwood v. Kerr-McGee Corp.,* — U.S. —, 19 S.Ct. 615, 620, 74 L.Ed.2d 443 (1984).

As in *Silkwood,* the Circuit Court here did not rule the Florida statute unconstitutional; rather, the 11th Circuit merely held that the Florida long-arm statute was inapposite in this particular situation since its operation (*vis-a-vis* Rudzewicz) offended the fundamental fairness requirement of due process.

It was the *operation* of Florida's statute that the Circuit Court found offensive, not the constitutionality of its *language.*

6.1.5. No Express Declaration

In a similar holding, this Court reviewed a decision of the California Superior Court; in fact, the opinion from that state's high court did not rule on the constitutionality of a California statute. This Court explained there that:

> The opinion below does not purport to determine the constitutionality of the . . . jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction.[48]

Indisputedly, *Kalko* and *Silkwood* clearly deny an appeal from a lower court unless:

(a) A state statute *per se* was specifically addressed by the reviewing court, and

(b) The statute, unquestionably, was held as unconstitutional.

In our case, the constitutionality of the Florida long-arm statute was neither examined by the Circuit Court, nor found to be "repugnant to the Constitution." The Cir-

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48 *Kulko v. Superior Court of California,* 436 U.S. 84, 92 n.4 (1978).

cuit Court "... merely applied the law of the state ..."[49] to the facts of the particular circumstances and found that the Florida long-arm statute was inapplicable in this particular situation since to apply it, under the unique set of circumstances presented here, would offend fundamental fairness.

6.1.6. Two-Prong Test Required

In its briefing, Burger King has chosen to ignore the traditional two-prong test which may permit the exercise of *in personam* jurisdiction in a federal trial court.

For a United States district court to assert jurisdiction under any state long-arm statute, there must be a two-prong test, with each prong independently applied. This test was recently reiterated in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*[50] The test asks both:

(a) Whether the non-resident defendant falls within the literal grasp of Florida's long-arm statute?[51] And, if so ...

(b) Whether the non-resident defendant has some "minimum contacts" in Florida?[52]

Given the first prong of the test, Rudzewicz may well have fallen within the literal wording of the state's long-

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49 *Baxter v. Continental Casualty Co.*, 234 U.S. 578, 579 (1931).

50 700 F.2d 1026, 1028 (5th Cir. 1983); *cert. denied*, — U.S. —, 104 S.Ct. 2180 (1984).

51 *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

52 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309 (8th Cir. 1982).

arm statute: he failed to do an act, required by the contract to be done, in Florida. Yet, on the second prong of the test, the Circuit Court held that Rudzewicz, as an individual, lacked the constitutionally-requisite "minimum contacts" in Florida.[53]

Thus, the issue raised by Burger King here is this: can a statute be constitutional as written, yet, have an unconstitutional effect in its operation on a particular defendant? Certainly!

The operation of statutory language (which is otherwise constitutional) may deprive an individual of "due process" in some circumstances and, consequently, such operation would be fundamentally unfair.

The Circuit Court had absolutely nothing to say about the constitutionality of the Florida long-arm statute *per se*. In reversing, however, the Circuit Court did hold that—in this instance, when that statutory language is applied here to Rudzewicz—it violates his individual "due process" rights.

6.1.7. Statute Could be Constitutional

This Florida long-arm statute vests *in personam* jurisdiction where the non-resident defendant fails to do an act, required to have been done, in Florida. Such a long-arm statute might be considered constitutional on its face and when applied to certain facts.

Assuming there are "minimum contacts," one can imagine certain acts which, if not done in Florida, might well permit *in personam* jurisdiction under that long-arm stat-

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53 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

ute. Personal jurisdiction could be obtained under Florida's long-arm statute where, under the terms of a contract, a non-resident defendant fails:

(a) To come to Florida to provide prepaid services as contracted.[54]

(b) To honor a guarantee of a Florida contract, upon which others have relied to their detriment.[55]

Arguably, however, one could challenge the "undone acts" provision of the Florida long-arm statute as providing inadequate notice and being unconstitutionally vague. Yet, since the Circuit Court never reached that issue, neither will we debate it here.

6.1.8. Federal Courts Must Inquire

The reach of a long-arm statute is a question of state law. As a general rule, federal courts must accept the interpretation given a long-arm statute by a state's supreme court; however, the Florida Supreme Court has never ruled on Section 48.193(1)(g), Fla. Stat. (1983).

However, the application, to an individual, of a state's long-arm statute, indeed, is limited by constitutional "due process" considerations. The degree of limitation is a question of federal law. Determining whether a state's long-arm statute should otherwise limit a federal court's personal jurisdiction calls for an inquiry.

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54 *Lacy v. Force V Corp.*, 403 So.2d 1050 (Fla. 1st D.C.A. 1981).

55 *Horace v. American National Bank and Trust Co.*, 251 So.2d 33 (Fla. D.C.A. 1971).

Even Florida's Third District Court of Appeals agreed that an independent inquiry is required when dealing with this particular long-arm statute:

> Federal court review of Section 48.193(1)(g), alone, as a sole basis for jurisdiction over a non-resident has been limited but . . . *constitutional requirements are not met by relying solely on Section 48.193(1)(g), Florida Statutes* [emphasis added].[56]

Here, Defendant Rudzewicz may well have met the literal requirements of the Florida long-arm statute; however, for *in personam* jurisdiction to vest in a U.S. district court, there must be some "minimum contacts" in Florida, as well, to satisfy federal "due process" requirements. Rudzewicz had no contacts, to speak of, in Florida.

Thus, since both tests must be met, and because Rudzewicz lacked "minimum contacts," the federal trial court could have no personal jurisdiction over him, despite the literal language of that statute.

As the Circuit Court did here, federal courts not only are permitted, but are mandated, to constrain the reach of a state's long-arm statute when constitutional "due process" dictates.[57]

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56 *Engineered Storage v. National Partition*, 415 So.2d 114, 115 n.3 (Fla. 3d D.C.A. 1982). *See also Scordilis v. Drobnicki*, 443 So.2d 411, 412-414 (Fla. 4th D.C.A. 1984); *Poston v. American President Lines, Ltd.*, 452 F.Supp. 568 (S.D.Fla. 1978); *Lakewood Pipe*, 379 So.2d 475 (Fla. 2d D.C.A. 1979), *appeal dismissed*, 383 So.2d 120 (Fla. 1980); *Osborn v. University Society, Inc.*, 378 So.2d 873 (Fla. 2d D.C.A. 1979).

57 *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309 (8th Cir. 1982).

Here, in constraining Florida's otherwise unfettered long-arm statute, the 11th Circuit found that Rudzewicz may have fallen within the reach of that long-arm statute, if literally construed; yet, it also held that statute, if personally applied to Rudzewicz (who is independently protected as a citizen of the United States by the federal Constitution), " . . . would offend the fundamental fairness which is the touchstone of due process" (J.A. 182-183).

In the end, the Circuit Court did not effect the constitutionality of the Florida long-arm statute, nor did it question its validity as being repugnant to the Constitution; it did hold, however, that under these particular circumstances, and as applied only to Rudzewicz, forcing him to defend against Burger King in Florida (rather than in Michigan) would violate his individual right to "due process."

6.1.9. Florida Supreme Court Never Ruled

As a general rule, this Court will not grant a petition for *certiorari* where the state's court of last resort has never ruled on a specific matter.[58]

The Florida Supreme Court has never ruled on the constitutionality of Subsection (g) of Section 48.193(1), Fla. Stat. (1983).[59]

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58 Rules of the Supreme Court, 17.1(a); see also, *Silkwood, supra; Kulko, supra; Perry Education Ass'n v. Perry Local Edudations' Ass'n*, 103 S.Ct. 948 (1983); *Wilson v. Cook*, 327 U.S. 474 (1946).

59 The Florida Supreme Court did rule on Subsection (b) of Section 48.193(1) in *Ford Motor Co. v. Atwood Vacuum Machine Co.*, 392 So.2d 1305 (Fla. 1981). Quite differently than this case, the court only addressed the tort claim (effected by 48.193(1) (b), Fla. Stat.), and not the contract claim (effected by 48.193(1) (g), Fla. Stat.).

Therefore, this is not a case where ". . . a federal court of appeals . . . has decided a federal question in a way in conflict with a state court of last resort. . . ."[60] Consequently, Burger King's petition for *certiorari* should be denied, in this respect.

6.1.10. Conclusion

The Circuit Court held that by operation—not by construction—this Florida statute could not be constitutionally employed to obtain *in personam* jurisdiction over Rudzewicz by the federal district court.

Therefore, since the constitutionality of the Florida long-arm statute was never at issue, one way or the other, Burger King has no appeal.

Furthermore, since no federal question is in issue, Petitioner's improvident appeal should not be treated as a Petition for Writ of Certiorari.

6.2. No "Minimum Contacts"

Failure to Mail Checks
Standing Alone
Establishes no "Minimum Contact"

Rudzewicz's failure to mail checks to Florida, standing alone, does not establish the constitutionally-required "minimum contacts" to confer in personam jurisdiction.

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60 Rules of the Supreme Court, 17.1(a).

This Court has promulgated an expansive body of law on "minimum contacts" over the past 106 years.[61]

Moreover, since 1974, a total of five circuit courts have ruled on the same matter now before this Court. Not surprisingly, there is unanimity—and no conflict—on this personal jurisdiction issue among the 5th, 6th, 7th, 8th, and 11th Circuits.

6.2.1. "Visiting State" not Enough

In *Hydrokinetics, supra,* the complaint, filed in Texas against a non-resident Alaska buyer, was dismissed. The Alaska firm merely purchased equipment from a Texas firm to be shipped out to the Klondike.

Personal jurisdiction was unwarranted because the Alaska firm did not purposefully avail itself of the privilege of conducting business within Texas or invoke the benefits and protections of Texas law. While contract negotiations were conducted by telex, telephone, and letter, two officers of the non-resident buyer visited the forum state to inspect the equipment and facilities.

The trial court properly dismissed the complaint and concluded that "the Defendant never made any calculated effort to engage in or solicit business in Texas with a Texas company nor had any expectation of extracting profits."[62]

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61 *Pennoyer v. Neff*, 95 U.S. 714 (1878); *International Shoe Co. v. Washington, supra; McGee v. International Life Ins. Co., supra; Hanson v. Denckla*, 357 U.S. 235 (1958); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Kulko v. Superior Court of California, supra; World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

62 *Hydrokinetics, Inc. v. Alaska Mechanical, Inc., supra* at 1027-1028.

6.2.2. "Obligation to Pay" not Enough

In *Scullin Steel, supra,* the 8th Circuit held that the "obligation" to make payments was not enough for a forum state (Missouri) to obtain personal jurisdiction over a non-resident defendant (in Pennsylvania):

> [T]he use of interstate facilities (telephone, the mail) [and] the making of payments in the forum state . . . are secondary or ancillary factors and cannot alone provide the "minimum contacts" required by due process. *See . . . Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co.*, 558 F.2d at 453 (use of facilities of interstate commerce); *McQuay, Inc. v. Samuel Schlosberg, Inc.*, 321 F.2d 902, 905-06 (D.Minn. 1971) (payment within forum).[63]

6.2.3. "Two Years of Rent" not Enough

In *Telco Leasing, Inc. v. Marshall County Hospital,*[64] an Illinois lessor, attempted to obtain personal jurisdiction over a non-resident lessee by claiming that "minimum contacts" were established because the non-resident:

(a) Delivered rent payments for two years to the forum state; and,

(b) Signed a lease (outside the forum state) which was to have been binding " . . . when accepted by Lessor in the State of Illinois . . .;" and,

(c) Communicated in writing and by telephone to Plaintiff's office in the forum state.

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63 *Scullin Steel Co., supra* at 314.

64 586 F.2d 49 (7th Cir. 1973).

The trial court dismissed the complaint for lack of personal jurisdiction, proclaiming that:

> Whether or not there are sufficient minimum contacts to comport with due process cannot be determined by any set formula or rule of thumb, but must rest on a consideration of what is fair and reasonable in the circumstances of each particular case.[65]

Employing a "totality of the circumstances" test, the 7th Circuit held there was no personal jurisdiction over the non-resident defendant because:

> . . . it is not the terms of the lease that are controlling, but all the facts and circumstances of the transaction, for it is from the total picture that we determine whether or not the exertion of jurisdiction would comport with the notions of fair play and substantial justice.[66]

6.2.4. "Mail and Phone" not Enough

In *Weller v. Cromwell Oil Co.*,[67] California-based, non-resident defendants telephoned and sent mail to the forum state, Ohio.

The 6th Circuit asserted no jurisdiction over these Californians who were served with process in California; were never in Ohio to commit any act or omission, either personally or by any agent; never negotiated this contract in Ohio; and, made all telephone calls, and mailed all correspondence, from California.

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65 *Id.* at 50 citing *Hutter Northern Trust v. Door County Chamber of Commerce*, 403 F.2d 481 (7th Cir. 1968).

66 *Id.* at 52.

67 504 F.2d 927 (6th Cir. 1974).

The court held that mere contacts by mail or telephone do not confer personal jurisdiction upon a non-resident under the "transacting business" clause of a state's long-arm statute.

6.2.5. "Contractual Obligation Alone" not Enough

There is some Florida Appellate law that a contractual obligation standing alone, which requires payment to be made to a creditor in Florida, was not enough to meet the "minimum contacts" standard.[68]

The Florida Supreme Court has considered circumstances where there were no "continuous and systematic activities" with the forum state. In citing *International Shoe*, the Florida Supreme Court has reasoned that:

> Due Process does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contact, ties, or relations.[69]

The Florida state appeal court concurs with the constitutional "minimum contacts" test:

> [U]nder a given factual situation, even though a non-resident may appear to fall within wording of the long-arm statute, a plaintiff may not constitutionally apply the statute to obtain jurisdiction in the absence of the requisite minimum contacts with the forum state.[70]

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68 *Lakewood Pipe of Texas, Inc. v. Rubaii, supra; Oriental Imports and Exports, Inc. v. Maduro & Curiel's Bank, N.V.*, 701 F.2d 889 (11th Cir. 1983).

69 *Ford Motor Company v. Atwood Vacuum Machine Co., supra*, at 1310.

70 *Osborn v. University Society, Inc., supra* at 877.

In further elaboration, a Florida appeals court (1st D.C.A.) determined:

> Unquestionably the single most important factor to be considered is whether "the defendant's conduct and connections with the forum . . . are such that he should reasonably anticipate being hailed into court there . . ." *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 297. *It is essential that this circumstance be considered from the perspective of the defendant—not from that of the plaintiff* [emphasis added].[71]

6.2.6. Conclusion

There is unanimity among the federal circuits on this matter and, as well, there is some Florida appellate law to support this premise: the "obligation" to make payments, standing alone, does not provide constitutionally-requisite "minimum contacts" to support *in personam* jurisdiction over a non-resident defendant.

7. CONCLUSION

It is clear from the record below, as well as the Eleventh Circuit's decision, that:

A. Section 48.193(1)(g) of the Florida "long arm" statute was never held "unconstitutional."

B. The Eleventh Circuit Court of Appeals ruled that, while Rudzewicz may have fallen within the literal grasp of Florida's long-arm statute, its application to him as an individual, under these circumstances, violated his constitutional right to "due process."

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71 *Lacy v. Force V Corporation, supra* at 1054.

While this Court could grant Burger King's petition for *certiorari*, it is manifest that this Court has no jurisdiction since no Florida statute was declared unconstitutional.

As relief, we pray that this Court dismiss the appeal and deny Burger King's alternatively-argued petition for *certiorari*.

Respectfully submitted,

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